

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
WCIU-TV Limited Partnership)	Facility I.D. No. 71428
Licensee of Station WCIU-TV)	NAL/Acct. No. 0841420034
Chicago, Illinois)	FRN: 0009562265

**NOTICE OF APPARENT
LIABILITY FOR FORFEITURE**

Adopted: March 26, 2008

Released: March 27, 2008

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”) issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the “Act”), and Section 1.80 of the Commission’s Rules (the “Rules”),¹ by the Chief, Video Division, Media Bureau pursuant to authority delegated under Section 0.283 of the Rules,² we find that WCIU-TV Limited Partnership (the “Licensee”), licensee of Station WCIU-TV, Chicago, Illinois (the “Station”), apparently willfully and repeatedly violated Section 73.670 of the Rules, by failing to comply with the limits on commercial matter in children’s programming.³ Based upon our review of the facts and circumstances before us, we conclude that the Licensee is apparently liable for a monetary forfeiture in the amount of sixteen thousand, five hundred dollars (\$16,500).

II. BACKGROUND

2. In the Children’s Television Act of 1990, (the “CTA”),⁴ Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children’s programming, and to consider in its review of television license renewal applications the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, which limits the amount of commercial matter which may be aired during children’s programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (a “program-length commercial”).⁵

3. On August 1, 2005, the Licensee filed its license renewal application (FCC Form 303-S)

¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

² See 47 C.F.R. § 0.283.

³ See 47 C.F.R. § 73.670.

⁴ Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b and 394.

⁵ *Children’s Television Programming*, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

for Station WCIU-TV (the “Application”) (File No. BRCT-20050801ADO). In response to Section IV, Question 5 of the Application, the Licensee stated that, during the previous license term, the Station failed to comply with the limits on commercial matter in children’s programming specified in Section 73.670 of the Rules. In Exhibit 19, the Licensee indicated that between September 30, 1998, and October 19, 2003, the Station violated the children’s television commercial limits on ten occasions. Of these overages, one was 30 seconds in duration, one was 46 seconds in duration, two were 90 seconds in duration, and six were program-length commercials. The Licensee reported that one conventional overage resulted from human error. The Licensee also indicated that one conventional overage resulted from a technical failure, and it attributed one conventional overage to an error that occurred in the programming supplied by the Station’s national television network, The WB Network.

4. In addition, the Licensee stated that on four occasions, the Station aired a commercial for Eggo waffles containing “fleeting images” of a “Pokemon” character during the “Pokemon” program. According to the Licensee’s description, a “Pokemon” character appeared during the commercial and transformed “into an embossed image of itself on several Eggo waffles” while the announcer stated, “And look out for limited edition Pokemon Eggo waffles. You can catch ‘em all.” Further, the Licensee reported that on two occasions, the Station aired a commercial for a General Mills “Fruit by the Foot” product containing a “fleeting appearance” by a “Pokemon” character during the “Pokemon” program. The Licensee stated that Station personnel did not realize that these advertisements contained appearances by a Pokemon character. The Licensee argued that these incidents are “minor” since the advertisements contained only a “fleeting” appearance of a Pokemon character and Station personnel were unaware of the appearances by a Pokemon character contained in the advertisements when the advertisements were scheduled and aired. The Licensee also asserted that the “minor and fleeting” appearances by the “Pokemon” character could not have significantly harmed a child viewer and that these instances do not constitute program-length commercials. The Licensee described the measures taken to prevent future violations of the commercial limits and contended that its new procedures have prevented recurrence of similar incidents.

III. DISCUSSION

5. Station WCIU-TV’s record during the last license term of exceeding the Commission’s commercial limits on nine occasions, including six program-length commercials, constitutes an apparent willful and repeated violation of Section 73.670 of the Rules.⁶ With respect to the Station’s broadcast of commercials for Eggo waffles and a General Mills “Fruit by the Foot” product, although the Licensee contended that these commercials contained only “fleeting” appearances by a “Pokemon” character, the Commission has stated on numerous occasions that, where a commercial announcement includes a product related to the program in which the commercial is broadcast, then the program is a program-length commercial regardless of the duration of the appearance of the program-related product in the commercial.⁷ Moreover, we believe that, in the context of the cognitive abilities of young children, there

⁶ As discussed above, the Licensee attributed one conventional overage to a technical failure. In *Children’s Television Programming*, the Commission specifically recognized that licensees may experience “occasional emergency scheduling change[s],” which would be taken into consideration in determining whether “extenuating circumstances” mitigated any resulting children’s television commercial limits violations. 6 FCC Rcd at 2126 n.123. On reconsideration, the Commission affirmed this policy, stating that “where the facts demonstrate that a slight overage is caused by a last-minute emergency scheduling change, we will consider such a lapse to be ‘*de minimis*.’” *Children’s Television Programming (Recon.)*, 6 FCC Rcd at 5096. Although the conventional overage reported by the Licensee did not involve a last-minute emergency scheduling change, we believe the technical failure which caused it constitutes an extenuating circumstance. Accordingly, this overage shall be considered *de minimis*, and shall not be considered in determining the sanction deemed appropriate for the other violations of the children’s television commercial limits reported by the Licensee.

⁷ *UTV of San Francisco, Inc. (KBHK-TV)*, 10 FCC Rcd 10986, 10988 (1995); *see also WPIX, Inc.*, 14 FCC Rcd 9077 (MMB 1999) (commercial for “Spirit of Mickey” home video showing brief image of Donald Duck on cover

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is the potential for confusion between these commercials and the “Pokemon” program since the commercials contained appearances by a “Pokemon” character and the consequent likelihood that children may associate it with the program.

6. Congress was particularly concerned about program-length commercials because young children often have difficulty distinguishing between commercials and programs.⁸ Given this congressional concern, the Commission made it clear that program-length commercials, by their very nature, are extremely serious violations of the children’s television commercial limits, stating that the program-length commercial policy “directly addresses a fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter, not be all the more confused by a show that interweaves program content and commercial matter.”⁹

7. The number and magnitude of the overages at issue here mean that children have been subjected to commercial matter greatly in excess of the limits contemplated by Congress when it enacted the Children’s Television Act of 1990.¹⁰ Although the Licensee indicated that some of the commercial overages resulted from human error and/or inadvertence, this does not mitigate or excuse the violations. In this regard, the Commission has repeatedly rejected human error and inadvertence as a basis for excusing violations of the children’s television commercial limits.¹¹ Regarding the reasons given for one conventional overage, the fact that it resulted from errors which occurred in the programming supplied by the Station’s television network or was inserted into the program by the Station’s television network does not relieve it of responsibility for the violations. In this regard, the Commission has consistently held that a licensee’s reliance on a program’s source or producer for compliance with our children’s television rules and policies will not excuse or mitigate violations which do occur.¹² Furthermore, the Licensee’s implementation of policies to prevent subsequent violations of the Commission’s children’s television rules and policies does not relieve the Licensee of liability for violations which have occurred.¹³

8. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹⁴ Section 312(f)(1) of the Act defines willful as “the conscious and

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of video aired during “Quack Pack” program); *Act III Broadcasting License Corp. (WUTV(TV))*, 10 FCC Rcd 4957 (1995), *aff’d*, 13 FCC Rcd 10099 (MMB 1997) (commercial for a fast food restaurant promoting a trip to Disney World as a contest prize contained a brief image of Goofy and aired during the program “Goof Troop”).

⁸ S. Rep. No. 227, 101st Cong., 1st Sess. 24 (1989).

⁹ *Children’s Television Programming*, 6 FCC Rcd at 2118.

¹⁰ *Children’s Television Programming*, 6 FCC Rcd at 2117-18.

¹¹ See, e.g., *LeSea Broadcasting Corp. (WHKE(TV))*, 10 FCC Rcd 4977 (MMB 1995); *Buffalo Management Enterprises Corp. (WIVB-TV)*, 10 FCC Rcd 4959 (MMB 1995); *Act III Broadcasting License Corp.*, *supra*; *Ramar Communications, Inc. (KJTV(TV))*, 9 FCC Rcd 1831 (MMB 1994).

¹² See, e.g., *Max Television of Syracuse, L.P. (WSYT(TV))*, 10 FCC Rcd 8905 (MMB 1995); *Mt. Mansfield Television, Inc. (WCAX-TV)*, 10 FCC Rcd 8797 (MMB 1995); *Boston Celtics Broadcasting Limited Partnership (WFXT(TV))*, 10 FCC Rcd 6686 (MMB 1995).

¹³ See, e.g., *WHP Television, L.P. (WHP-TV)*, 10 FCC Rcd 4979, 4980 (MMB 1995); *Mountain States Broadcasting, Inc. (KMSB-TV)*, 9 FCC Rcd 2545, 2546 (MMB 1994); *R&R Media Corporation (WTWS(TV))*, 9 FCC Rcd 1715, 1716 (MMB 1994); *KEVN, Inc. (KEVN-TV)*, 8 FCC Rcd 5077, 5078 (MMB 1993); *International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969).

¹⁴ 47 U.S.C. § 503(b)(1)(B); see also 47 C.F.R. § 1.80(a)(1).

deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.¹⁵ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹⁶ and the Commission has so interpreted the term in the Section 503(b) context.¹⁷ Section 312(f)(2) of the Act provides that “[t]he term ‘repeated,’ when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”¹⁸

9. The Commission’s *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$8,000 for violation of Section 73.670.¹⁹ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”²⁰

10. In this case, an upward adjustment is justified in light of the number and nature of the commercial overages. Accordingly, we find that the Licensee is apparently liable for a forfeiture in the amount of \$16,500 for its apparent willful and repeated violation of Section 73.670.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s Rules, that WCIU-TV Limited Partnership is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of sixteen thousand, five hundred dollars (\$16,500) for its apparent willful and repeated violation of Section 73.670 of the Commission’s Rules.

12. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s Rules, that, within thirty (30) days of the release date of this *NAL*, WCIU-TV Limited Partnership SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank-Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the *NAL*/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code).

¹⁵ 47 U.S.C. § 312(f)(1).

¹⁶ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹⁷ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹⁸ 47 U.S.C. § 312(f)(2).

¹⁹ See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (“*Forfeiture Policy Statement*”), recon. denied, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

²⁰ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(4); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section II.

14. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Barbara A. Kreisman, Chief, Video Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.²¹

17. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to WCIU-TV Limited Partnership, 26 North Halsted Street, Chicago, Illinois 60661, and to its counsel, J. Brian DeBoice, Esquire, Cohn and Marks, LLP, 1920 N Street, N.W., Suite 300, Washington, D.C. 20036-1622.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

²¹ See 47 C.F.R. § 1.1914.